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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JOHN L. CALVERT,

No. CV 07-1466-JE

Plaintiff,

FINDINGS AND RECOMMENDATION

v.

WARDEN J.E. THOMAS,

Defendant.

JELDERKS, Magistrate Judge.

This prisoner civil rights action comes before the court on defendant's Motion to Dismiss (#40). Plaintiff has not filed any responsive brief to the Motion, and asks the court to decide defendant's Motion on the existing record. Defendant asks the court to dismiss the Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

Plaintiff originally filed this case alleging that the Bureau of Prisons' staff members are violating his right to equal

protection and subjecting him to cruel and unusual punishment by smoking in undesignated areas of the prison. According to plaintiff, he smoked for more than 30 years and was required to quit "cold turkey" by the Bureau of Prisons. He alleges that exposing him to second-hand smoke emitted by staff members smoking in non-designated areas causes adverse physical reactions, and constitutes a barbaric and torturous practice to which defendant is deliberately indifferent. Plaintiff seeks injunctive relief in one of two forms: either require defendant to reverse the smoking ban on inmates within the prison, or eliminate tobacco products from the prison entirely.

Defendant filed his Motion to Dismiss on October 6, 2009. On October 28, 2009 plaintiff notified the court of his transfer to FCI-Bastrop in Texas. While the situation plaintiff describes could possibly entitle him to injunctive relief requiring the Bureau of Prisons to enforce its smoking policies, his transfer to another prison moots his claims. *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam) (prisoner's claims for injunctive relief relating to prison conditions are mooted by transfer to another institution). Accordingly, the Complaint should be dismissed.

RECOMMENDATION

Plaintiff's Complaint (#2) should be DISMISSED on the basis that it is moot.

SCHEDULING ORDER

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections. Failure to timely file objections to any factual determination(s) of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issue(s), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

IT IS SO ORDERED.

DATED this 24th day of March, 2010.

s/ John Jelderks
John Jelderks
United States Magistrate Judge